IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924.

Nos. 935, 936, 937 and 938

UNITED STATES *ex rel.* F. C. RUTZ, R. R. FAUNTLEROY, J. R. STENECK AND HARRY C. WANNER,
Appellants,

vs.

ROBERT R. LEVY, UNITED STATES MARSHAL, IN AND FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF IN OPPOSITION TO MOTION OF THE UNITED STATES TO DISMISS OR AFFIRM.

HERBERT POPE,
FRANK E. HARKNESS,
BENJAMIN M. PRICE,
Attorneys for Appellants.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

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STATEMENT.

The rights of a defendant in a removal proceeding guaranteed to him by the Constitution as construed by this court in *Tinsley* v. *Treat,* 205 U. S. 20, would be nullified if the contention of the Government in these cases is sustained. We contend that a question of such importance should not be disposed of upon a motion to dismiss.

The appeal of Rutz (whose record is to answer for the substantially similar records in the other three appeals) grows out of two proceedings for his removal from the Northern District of Illinois to the Northern District of Ohio. After extensive hearings in which the Government was afforded every opportunity to present its evidence, Rutz was discharged by United States Commissioner Glass, who found that there was no probable cause to believe Rutz guilty of a violation of the Sherman Act charged in the indictment found against him in the Northern District of Ohio. Four days later a new complaint similar to the first complaint and based upon the same indictment was filed before District Judge Cliffe sitting as a committing magistrate. This second complaint, although admittedly for the same offense and called a *de novo* proceeding, was accompanied by no showing of error, fraud, or irregularity in the proceedings before Commissioner Glass, nor was there any claim that the Government had evidence in support of the charge not available to it in the hearing before Commissioner Glass. Judge Cliffe refused to consider evidence as to what had occurred before Commissioner Glass and treated the fact of appellant's discharge in that proceeding as wholly irrelevant.

The question presented is, therefore, whether a discharge by an examining magistrate in a removal proceeding, after a full and fair hearing on the question of of probable cause in a forum of the Government's own choosing, is to any degree a protection to the party discharged against another removal proceeding based on the same charge, or whether, as the Government contends, it has the absolute right to select another tribunal and prosecute a second proceeding in entire disregard of the earlier decision.

This is the precise question which this court took care

to leave open, when it held in *Morse* v. *United States,* 45 Sup. Ct. Rep. 209, decided February 2, 1925, that a discharge in removal proceedings was not a bar to the arrest of the party discharged in the jurisdiction in which the indictment was obtained nor to his trial upon the indictment. The court said:

> "The judgment rendered therein, (*i. e.,* in removal proceedings) *whatever may be its effect in subsequent proceedings of the same character involving the same question* * * * does not abridge the power of the trial court to deal independently with the main cause if the accused be subsequently arrested and brought before that court to answer to the indictment." (Italics are ours.)

The fact that this court was at pains to reserve this point in the case above cited might well be deemed a sufficient justification for this appeal and should be of itself a conclusive answer to this motion to dismiss. The Government's contention comes to this—that although a defendant has been discharged after a plenary investigation of the question of probable cause, in which it participated, and against the conduct of which it can make no allegation of error, fraud, or irregularity, it has the right arbitrarily to institute a second proceeding merely because it is dissatisfied with the result of the first hearing. Obviously, if a second proceeding can thus be instituted, the procedure can be repeated as often as the Government is defeated, until it either finds an examining magistrate who will hold the defendant, or else convinces the defendant of the futility of asserting his constitutional right to rebut the charges against him, since the only result of his making a successful defense before one examining magistrate will be to subject him to the burden of a new proceeding before another.

We submit that these appellants were entitled to prosecute their appeal against a claim of this character, without being subjected either by Judge Evans or by the Government to the imputation of bad faith, and that they are entitled to a full hearing upon the merits of their case.

That we have not stated the Government's claim too strongly will be amply demonstrated by a brief reference to the printed record.

It has been stipulated by counsel that the records in these four cases are so nearly alike that the record in the Rutz case alone need be printed, and that the other three cases shall abide the decision in that case. Counsel for the Government nevertheless have made reference to special circumstances alleged to exist in the case of one of the appellants whose record is not printed. Conceiving this reference to be a violation of the stipulation, we do not consider that it calls for comment, and we shall confine our discussion to what appears in the printed record.

The proceeding before Judge Cliffe above referred to was commenced by the filing of the complaint on December 24, 1924. Upon objection raised by counsel to the institution of this second proceeding, Judge Cliffe set for hearing on January 12, 1925, the question whether, in view of the former proceeding before Commissioner Glass, he would entertain the complaint. Upon that date counsel for appellants objected to further proceedings and offered in support of their objection affidavits of appellants setting forth the proceedings before Commissioner Glass. The affidavit of Rutz to which were attached, as exhibits, a copy of the complaint filed before Commissioner Glass and a copy of his opinion, stated that the only evidence offered by the Government was a certified copy of the indictment; that Rutz and other wit-

nesses testified and were cross-examined by counsel for the United States and that certain documentary evidence was offered for him; that no evidence in rebuttal was offered by the United States, although opportunity was afforded to do so, and that after argument the Commissioner entered an order discharging Rutz.

Counsel for the Government objected to the admission of these affidavits as irrelevant and immaterial, stating that they were *"proceeding here de novo without regard to any other proceeding in this jurisdiction."* (Rec., ...4...) Judge Cliffe sustained this objection but later permitted the affidavits to be filed purely to preserve appellants' record, and then upon motion of the Government struck them from the files. He refused to read or consider them.

Counsel for the Government offered no evidence and made no showing of any character regarding the proceedings before Commissioner Glass and made no claim or allegation of any fraud, error, irregularity or impropriety of any kind either in the rulings of the Commissioner during the hearing before him or in his findings as to probable cause, nor was any suggestion made that they expected to offer evidence at the hearing which had not been produced before the Commissioner.

Upon this record, Judge Cliffe overruled the objection to further proceedings and set the case for hearing on the question of probable cause for January 14, 1925, at two o'clock. The four appellants appeared in open court during the forenoon of January 14th and were arrested and taken into custody upon warrants issued by Judge Cliffe. Petitions for writs of habeas corpus were then presented to Circuit Judge Evans, designated and sitting in the District Court of the United States, and the writs were granted by him, returnable January 22, 1925.

Appellants were then released under bonds of $5,000 each.

On January 22, 1925, Judge Evans heard oral argument, accepted briefs and took the matter under advisement. On February 2nd he filed an opinion and entered an order quashing the writs. On the same date these appeals were taken, assignments of error filed, and supersedeas granted. The records on appeal were filed in this court on February 26, 1925, and show on their face that they were completed and certified to by the clerk of the District Court on February 24, 1925.

ASSIGNMENTS OF ERROR.

The errors assigned below on behalf of appellant Rutz were that the District Court (Judge Evans) erred:

1. In refusing to hold that the detention of Rutz by the marshal under the warrant of arrest issued by Judge Cliffe was in violation of Section 2, Article III, of the Constitution, in that such warrant of arrest was issued in a second and *de novo* proceeding in disregard of the prior discharge in a similar proceeding before Commissioner Glass, who had found after a full hearing that there was no probable cause to believe that Rutz had committed the offense charged, and although there was no showing in said *de novo* proceeding of any fraud, bias, error or any impropriety whatsoever in the hearing before Commissioner Glass, or in the discharge of Rutz, or that the Government proposed or intended to offer or introduce in the *de novo* proceeding any evidence of probable cause in addition to or other than the evidence offered in said first proceeding.

2. In refusing to hold that such detention under such circumstances was in violation of the Sixth Amendment to the Constitution.

3. In refusing to hold that such detention under such circumstances was in violation of the Fifth Amendment to the Constitution.

4. In refusing to hold that such detention under such circumstances was in violation of the constitutional rights of said Rutz.

5. In refusing to hold that there was no law authorizing the institution of the second removal proceedings in view of the prior discharge after a full hearing under a complaint based upon the same alleged offense and the same indictment upon which the second removal proceeding was based.

6. In refusing to hold that the second removal proceeding was unwarranted by law.

7. In quashing the writ of habeas corpus.

BRIEF.

The Government bases its motion to dismiss or affirm "on the ground that the single question of law involved is elemental and that the appeals were not taken in good faith, but solely for the purpose of delay."

If we understand what counsel mean by the word "elemental" we do not object to its application to the question of law here involved. That the action of the court below and the contention of the Government in support thereof violate fundamental and elementary principles of the law and the Constitution is in fact the basis of this appeal, and the discussion of this point will be the best answer to the charge of bad faith in taking the appeal.

We should not refer to this charge further but for the fact that counsel for the Government, in their anxiety to have this appeal disposed of without a consideration of the merits, have again traveled outside the record by quoting on page 9 of their brief certain remarks made by Judge Evans after these appeals had been taken, and after the records had been certified to this court and dispatched to Washington for filing. The unfairness of this procedure is emphasized by the fact that counsel selected from the transcript of the very unusual discussion invited by Judge Evans after he had lost jurisdiction of these cases, only that part which served their purpose, and suppressed the portion which would have demonstrated that Judge Evans wholly misapprehended the facts. If this court were to follow the Government outside of the record, it would find that Judge Evans' remarks were due to his misunderstanding as to the time when the record had to be filed in this court and to his ignorance of the fact

that it had already been certified by the clerk of the District Court and sent to Washington for filing. He was under the erroneous impression that counsel were not required to file the record for at least ninety days and intended to delay filing it till the end of such period. He was also under the impression that the recent act amending the Judicial Code was effective February 13, 1925, the date of its enactment, instead of May 13, 1925, and was insistent with counsel that because of the amendment they should appeal to the Circuit Court of Appeals. The remarks quoted in the Government's brief were made before Judge Evans had been informed that the appeal to the Supreme Court had practically been perfected.

It is true that Judge Evans had already stated in his opinion that he thought the proceeding before him was for the purpose of delay. He cited no facts to support this conclusion, however, for the very good reason that there was none. And, with all deference to Judge Evans, we insist that other statements contained in his opinion are so clearly contrary to the facts disclosed by the record as to cast doubt upon his conclusions on any matter of fact arising in this case. Thus, in the excerpt from his opinion quoted on page 8 of the Government's brief, Judge Evans said:

> "There is not the slightest suggestion that the Judge before whom the present application is pending will not give to the decision of the Court Commissioner such weight as it deserves."

And again:

> "The petition before Judge Cliffe did not even disclose the prior proceedings before Commissioner Glass. The Judge therefore was clearly authorized to proceed with the hearing."

The record shows, however, that objection to the *de novo* proceeding before Judge Cliffe, based upon the

prior discharge by Commissioner Glass, was made at the very start, in other words, when the second complaint was filed. (Rec., 1.) Moreover, the transcript of the hearing before Judge Cliffe on January 12th shows that, without having had any opportunity to read the Commissioner's transcript, and without even looking at the affidavits setting forth the nature and result of the proceedings before the Commissioner, he announced that the Commissioner had exceeded his authority,—that he "arrogated or took upon himself the right to hear the case in its original inception." This pronouncement was manifestly based upon hearsay, and the transcript of this proceeding of January 12th shows that on this point Judge Cliffe had his mind made up before the hearing commenced. (Rec., 11, 12.)

The slightest consideration of the affidavits setting forth the proceedings before Commissioner Glass would have shown also that the Commissioner had not arrogated to himself "the right to hear the case in its original inception." The only evidence offered by the Government was the indictment itself, and the Commissioner cannot be criticized for having allowed the appellant to introduce more evidence than the Commissioner thought was necessary to rebut any *prima facie* case made by the indictment.

From the foregoing it clearly appears that Judge Evans' statements, quoted above, are just as erroneous as his later remarks, on and off the record, concerning delay. He, as well as Judge Cliffe, not only strayed from the record but indulged in assumptions entirely inconsistent with the facts appearing in the record, and the Government's brief exhibits the same tendencies.

Finally, it may well be asked what it is that is being delayed by the appeal in this case? There is nothing in

this record to show that any other proceeding is being delayed by this appeal. It is a matter of public record that the trial of the case in the Northern District of Ohio has been postponed indefinitely, on the application of the Government itself and over the objection of counsel for defendants already in court, to await the disposition of various removal proceedings, some of which have not yet been commenced.

As we have already indicated, however, there is a conclusive answer to any charge of delay. If the point upon which an appeal is taken is of substantial importance, and if it affords fair ground for controversy, and is unsettled by the authorities, no charge of bad faith can lie against those taking the appeal, even though it does involve delay, and even though the Government is the party delayed, nor should it be disposed of on a motion to dismiss or affirm. We assert that the question involved in this appeal is of that character.

We contend, *first*, that the record here presents a question not only of vital interest to the appellants, but also of peculiar importance in all criminal proceedings under such statutes as the Sherman Act, where the defendant sought to be removed from one part of the country for trial in another may be put to enormous expense and great inconvenience if required to bring numerous witnesses a long distance in order to make a successful defense to an unfounded charge; *second*, that the Government's position in this case, and the action of the lower court in sustaining that position, is not merely open to controversy, but that it is unsupported by any decided case, and is wholly inconsistent with the conception of the constitutional rights of the accused in a removal proceeding established by this court in *Tinsley* v. *Treat*, 205 U. S. 20; *third*, that where an issue has been

judicially determined, whether that adjudication is technically *res judicata* or not, there is a well settled rule that another judicial tribunal exercising concurrent jurisdiction has no power to retry or redetermine the same issue unless there is a showing of arbitrary action or exceptional impropriety in the judicial conduct of the first trial or hearing.

I.

THE IMPORTANCE OF THE QUESTION.

The importance to these appellants, and to other defendants in this same proceeding who have already been or may be discharged in other districts, of the question involved in this appeal, cannot be a subject of controversy. The Government has attempted to remove them to Cleveland there to undergo a long and burdensome trial on a criminal charge. The nature of this burden is revealed by the wholly indefinite and ambiguous character of the indictment in this case, which makes it possible that a defendant might be removed on the suggestion of one conspiracy or combination and tried in the Northern District of Ohio on an entirely different conspiracy or combination.

Where, as in the removal proceeding out of which this case grows, it is held that such an indictment makes a *prima facie* case, and the defendant then claims his constitutional right to rebut that case, he is called upon of necessity to rebut every possible kind of combination between himself and any other defendant which it may be claimed is provable under the indictment in the district where the case is triable. These appellants assumed that burden before Commissioner Glass, the officer selected by the Government to hear the case, and were successful

in establishing to his satisfaction that there was no probable cause to believe them guilty of the offense charged. Within four days after their discharge by Commissioner Glass, they were faced with the proposition that the Government regarded the proceeding in which they obtained their discharge as utterly futile and inept, and did not consider that its right to remove them had been affected in any degree by the finding of the Commissioner.

That this is the precise purport and effect of the Government's claim is undeniable. Counsel for the Government and Judge Cliffe made it absolutely clear that the character of the former proceeding was not in question. This record shows that the inquiry before Commissioner Glass was properly conducted and that the proof of lack of probable cause was plenary and conclusive. This court certainly cannot assume that this was not the case. But it is unnecessary to resort to any presumption, since the very heart of the Government's contention is that the fact of a former inquiry was irrelevant.

If the Government's view is correct, the question which immediately confronts a defendant in a removal proceeding is whether the constitutional right to contest removal on the ground of lack of probable cause is of any value. Is it worth his while to go to the expense and trouble of producing his witnesses to be cross-examined and his documents to be inspected by counsel for the Government, if the Government may immediately rearrest him and retry the question of probable cause before another examining magistrate? And since it necessarily follows from the Government's contention that it can ignore not only one defeat but any number of successive defeats, is it not obvious that removal proceedings resolve themselves into a contest of endurance, with the odds so heavily in favor of the Government that the only wise

course for the accused is to surrender his constituional right to resist removal, and submit at once to the jurisdiction of the trial court?

Counsel for the Government ignore this aspect of the case altogether. The suggestion of Judge Evans that Judge Cliffe might at some time have considered the record before Commissioner Glass does not relieve the difficulty which confronted the appellant. The question is whether, having once fully tried the question of probable cause before a tribunal having competent jurisdiction, he is to be harassed by repeated arrests and the necessity of repeated retrials of the same question before other tribunals of concurrent jurisdiction. If that is the case, his constitutional rights in removal proceedings are worthless. There was no possible way of testing that question except by objecting at the threshold to proceeding with the second hearing.

Any claim that this question is frivolous can be based only upon the notion that any resistance to removal proceedings before an examining magistrate is vexatious and obstructive; that the examining magistrate is a mere appendage of the Department of Justice; that, as counsel say in their brief (p. 13), "the most he can do is to order a defendant committed pending application for the issuance of a warrant of removal by a judge," and that an order of discharge is in reality an abuse of his powers.

II.

THE AUTHORITIES CITED BY COUNSEL FOR THE GOVERNMENT NOT ONLY DO NOT SUPPORT THEIR CONTENTION, BUT, SO FAR AS THEY HAVE ANY BEARING, ARE AGAINST IT, AND THE CONTENTION IS WHOLLY INCONSISTENT WITH THE DOCTRINE ESTABLISHED BY THIS COURT IN TINSLEY V. TREAT, 205 U. S. 20.

The position of counsel for the Government is that they were entitled to institute the proceedings before Judge Cliffe in entire disregard of the discharge of the appellants by Commissioner Glass, because that discharge was not an adjudication of the question of probable cause, and therefore not a bar to a second proceeding.

The only authorities cited by counsel as directly sustaining this contention are *United States* v. *Haas,* 167 Fed. 211, and *Morse* v. *United States, supra,* decided by this court February 2, 1925. As we have already pointed out, the latter case decided only that a discharge in removal proceedings did not preclude an arrest in the jurisdiction where the indictment was returned and a trial on the indictment, and expressly recognized that the effect of such a discharge in subsequent removal proceedings presented a different question.

The passing remark in *United States* v. *Haas, supra,* to the effect that "the decision of a committing magistrate refusing to hold a prisoner for trial *or removal* * * * is not *res adjudicata*" was not necessary to the decision and is entitled to little weight. The report shows that counsel for the defense admitted that a decision of a committing magistrate in removal proceedings was not "technically *res adjudicata*" and therefore the question was not in controversy. Moreover, the authorities cited in the opinion have nothing to do with re-

moval proceedings, but deal only with preliminary examinations before committing magistrates where the question was whether an accused should be held for a crime committed in the jurisdiction where the arrest took place. The court appears to have jumped to the conclusion that because a decision in such a proceeding was not *res judicata,* a decision of an examining magistrate in a removal proceeding could not be *res judicata.* But the distinction between the two proceedings is fundamental. This court has often held that in the class of cases first mentioned the preliminary hearing can be entirely dispensed with without violating any constitutional right of the accused.

Goldsby v. *United States,* 160 U. S. 70.
Lem Woon v. *Oregon,* 229 U. S. 586.
Ocampo v. *United States,* 234 U. S. 91.

But in *Tinsley* v. *Treat,* 205 U. S. 20, this court squarely held that when a proceeding was brought under Section 1014 with a view to removing the accused to another district, a preliminary hearing was a constitutional right of the accused and that the exclusion of evidence in rebuttal of the accusation was a violation of the Constitution.

The fact that the preliminary examination in a removal proceeding has its sanction in the Constitution cannot be ignored. Counsel for the Government consistently endeavor to belittle the function of the examining magistrate in such a proceeding. They refer to the fact that he cannot be considered as holding a court of the United States. But since the decision in *Tinsley* v. *Treat* it cannot be denied that he does perform a judicial function, and that, in the performance of that function, a specific duty is laid on him to protect the constitutional rights of the accused as declared by this court.

It is, we submit, impossible to reconcile this decision with the view advocated by the Government that an order of discharge in a removal proceeding is not only not technically *res adjudicata* but is a mere idle gesture having no legal consequence, since it may be immediately nullified by a new warrant and another arrest. Apparently the Government regards the constitutional right of the accused, established by *Tinsley* v. *Treat,* as a right to walk out of the commissioner's office into the arms of a United States marshal armed with another warrant for his arrest for the very offense which the commissioner had found no probable cause to believe he committed. It clearly appears from that decision, however, that the right recognized by this court is the right not to be removed to another district except upon a finding of probable cause to believe that he has committed an offense there, and, unless the discharge by the commissioner protects that right, the commissioner is deprived of jurisdiction to perform the function which this court has said he shall perform. Obviously no such fundamental question as this was presented or decided in *Morse* v. *United States, supra.*

As we have shown, counsel cite no authority for the Government's contention. Indeed, in the *Haas* case itself, although the court said that the technical doctrine of *res judicata* did not apply, it also held that the Government did not have the absolute right to a second hearing which is definitely claimed for it in this case. After using the language quoted by counsel on page 14 of their brief, the court went on to say (p. 212):

> "*But ordinarily, in the absence of special circumstances, the decision of any judicial officer having jurisdiction should be held to be conclusive on the same set of facts.* In this application I sit as a committing magistrate, with exactly similar jurisdiction as that of the commissioner. The evidence submitted is precisely the same in both cases, and *it would be*

> *entirely proper in this case to discharge the prisoner upon the ground that he has already been discharged by the judicial decision of another magistrate having concurrent jurisdiction.* Moreover, I have read the very elaborate and able opinion of Mr. Commissioner Ridgway, and concur entirely in his conclusions and in the grounds upon which he basis them." (Italics are ours.)

And in the case of *In re Wood*, 95 Fed. 288, where a district judge was applied to for removal of a defendant who had been discharged by a commissioner, the District Judge said:

> "* * * I am of the opinion that the action of the commissioner in an application of this kind, upon the full consideration of the testimony offered, and especially where such testimony is that upon which the indictment is found, should be final. *It should not be open to the government to file repeated petitions before different commissioners upon substantially the same state of facts.* If, for any reason, the government was unable to obtain the testimony of witnesses, and its case was therefore not fully presented, this would afford ground for a rehearing before the commissioner having cognizance of the matter. Where the hearing has been full and complete, the action of one commissioner in refusing to commit the defendant, unless such action has been arbitrary and in manifest disregard of his duty, ought not to be made the subject of review before a second commissioner." (Italics are ours.)

An exhaustive search has failed to disclose any other authority directly bearing on the question involved in this appeal. Both of these cases are directly opposed to the Government's claim of an absolute and unqualified right to a second hearing on the question of probable cause, and the *Wood* case is directly in favor of the view that the decision of an examining magistrate discharging a defendant after a full hearing is final.

The fact that the question has never been passed upon in any other reported case adds weight and substance to our contention. Few persons accused of crime in removal proceedings and discharged after a full hearing on the question of probable cause would tamely submit to the nullification of that discharge by a new accusation and a new arrest based on the same facts, and the fact that the reports show that no court of appellate jurisdiction has ever been called upon to pass upon the right to a second hearing is persuasive evidence that the law officers of the United States themselves have taken the view, with practical unanimity, that no such right exists. Indeed, the record in this case shows that the assertion was made before Judge Cliffe, and remained unchallenged, that in twenty-five years there had been no case in the Northern District of Illinois in which, after the accused in removal proceedings had been discharged by a commissioner, a second hearing was held by a District Judge on the same charge in utter disregard of the first proceeding.

III.

WHERE AN ISSUE HAS BEEN JUDICIALLY DETERMINED, WHETHER THAT ADJUDICATION IS TECHNICALLY RES JUDICATA OR NOT, THERE IS A WELL SETTLED RULE THAT ANOTHER JUDICIAL TRIBUNAL EXERCISING CONCURRENT JURISDICTION HAS NO POWER TO RETRY OR REDETERMINE THE SAME ISSUE UNLESS THERE IS A SHOWING OF ARBITRARY ACTION OR EXCEPTIONAL IMPROPRIETY IN THE JUDICIAL CONDUCT OF THE FIRST TRIAL OR HEARING.

This question will be more fully dealt with in the argument on the merits. For the purposes of the argument on the present motion a mere outline must suffice. A cursory review of some of the authorities will show at

least that counsel for the Government have misconceived or misstated the questions involved in this case.

In criminal cases as well as in civil cases the adjudication of any issue or fact by a judicial tribunal having jurisdiction to determine such issue or fact is conclusive in a subsequent proceeding between the same parties, even though this court has itself held that the original adjudication was wrong.

United States v. *Oppenheimer,* 242 U. S. 85.

This court there stated the rule in a way which is clearly applicable to the adjudication of the issue of probable cause by Commissioner Glass in this case. The court said (pages 87-88):

> "Upon the merits the proposition of the Government is that the doctrine of *res judicata* does not exist for criminal cases except in the modified form of the Fifth Amendment that a person shall not be subject for the same offense to be twice put in jeopardy of life or limb; and the conclusion is drawn that a decision upon a plea in bar cannot prevent a second trial when the defendant never has been in jeopardy in the sense of being before a jury upon the facts of the offense charged. It seems that the mere statement of the position should be its own answer. It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt. * * *
>
> The safeguard provided by the Constitution against the gravest abuses has tended to give the impression that when it did not apply in terms, there was no other principle that could. But the Fifth Amendment was not intended to do away with what in the civil law is a fundamental principle of justice (*Jeter* v. *Hewitt,* 22 How. 352, 364), in order, when a man once has been acquitted on the merits, to enable the Government to prosecute him a second time."

The final adjudication of the issue of probable cause

in a removal case by a judicial tribunal having jurisdiction to determine such issue falls clearly within the general rule as thus stated by this court. Such an adjudication does not determine, of course, any issue except the issue of probable cause for removal, but it does determine that issue just as conclusively as the issue of guilty or not guilty will be determined by a final adjudication in the court at Cleveland between the parties in that court.

Furthermore, this court has expressly held that this rule as to a former adjudication is not modified by the fact that the law allowed no appeal from the former adjudication.

Johnson Company v. *Wharton*, 152 U. S. 252.

This court has also held that such a rule is applicable even when it necessarily results in impeding the action of the Government in matters involving public authority.

New Orleans v. *Citizens' Bank*, 167 U. S. 371.

The general rule that, except under special circumstances, a former adjudication must be held conclusive as to any issue or fact so determined is illustrated by a great variety of cases. It is applied even in the case of administrative officers who are authorized in special cases to determine questions of fact or mixed questions of law and fact.

Lane v. *Watts*, 234 U. S. 525.
Noble v. *Union River Logging R. R.* 147 U. S. 165.
Howe v. *Parker*, 190 Fed. 738 (C. C. A.).
Ross v. *Stewart*, 227 U. S. 530.
Ross v. *Day*, 232 U. S. 110.
Marquez v. *Frisbie*, 101 U. S. 473.

The obligatory character of this rule is fully recognized in an analogous case, *United States* v. *Yeung Chu*

Keng, 140 Fed. 748. In that case, deportation proceedings had been instituted against a native of China, and after a full hearing before a United States commissioner the defendant was discharged, only to be immediately arrested again upon a complaint filed in the District Court. In discussing whether the defendant could thus be proceeded against a second time, the court said:

> "I shall hold that he cannot be, where the proceeding before the commissioner appears to have been regular, and a hearing has been had, and a decision regularly made. *The ruling of the commissioner may have been erroneous—that is, against the evidence or contrary to law; but, in the absence of some showing of fraud or gross irregularity amounting to positive abuse, his judgment must be regarded as a determination of the issue.*
>
> * * * Congress might have intrusted the final determination of the facts on which the right to remain in the United States depends to executive officers, and their judgment of the existence of those facts might have been made final. It has not done so, but the fact that it has authorized judicial investigation does not justify the opinion that repeated investigation may be had, where the status of the Chinese person has been once regularly investigated, and he has been discharged, and *the government seeks another investigation upon substantially the same facts as it relied on in the first inquiry.*" (Italics are ours.)

See, also:

Ex parte Wong Yee Toon, 227 Fed. 247.

Decisions on the effect of a discharge in a habeas corpus proceeding have a distinct bearing upon the question here involved. Even where the accused has been remanded this court has indicated that in many circumstances the prior decision remanding the accused should be given controlling weight.

Salinger v. *Loisel,* 265 U. S. 224.

Wong Doo v. *United States,* 265 U. S. 239.

But where the accused has been discharged the court has gone further. In *Collins* v. *Loisel*, 262 U. S. 426, this Court held that the particular discharge in that case was not *res judicata*, but used the following significant language:

> "It is true that the Fifth Amendment in providing against double jeopardy, was not intended to supplant the fundamental principle of *res judicata* in criminal cases, *United States* v. *Oppenheimer*, 242 U. S. 85; and that a judgment in habeas corpus proceedings discharging a prisoner held for preliminary examination may operate as *res judicata*. But the judgment is *res judicata* only that he was at the time illegally in custody, *and of the issues of law and fact necessarily involved in that result.* The discharge here in question did not go to the right to have Collins held for extradition. It was granted because the proceedings on which he was then held had been irregular * * *." (p. 430.) (Italics are ours.)

And the following references appear in the accompanying footnote:

> "Compare *Ex parte Milburn*, 9 Pet. 704, 710; *In re White*, 45 Fed. 237; *United States* v. *Chung Shee*, 71 Fed. 277; 76 Fed. 951; *Ex parte Gagliardi*, 284 Fed. 190."

The clear inference to be drawn from these references, as well as from *Collins* v. *Loisel, supra*, is, as pointed out in *In re White, supra*, that a discharge on habeas corpus going to the merits is *res judicata* but where based on a mere technicality or irregularity, the discharge is not *res judicata*. Thus in *Ex parte Milburn, supra*, it was clear that there had been no determination on the merits and the court held that the prior discharge was not conclusive, whereas in *United States* v. *Chung Shee, supra*, where there had been a full hearing on the issue involved in the prior discharge, the Circuit Court of Appeals held that the discharge

> "* * * was an adjudication of the title of the de-

> fendant in error to be and remain in the United States, upon the facts which were involved upon the hearing of the writ. It is not claimed that she is amenable to deportation by reason of any fact arising since the date of that adjudication. * * * She cannot again be lawfully arrested and held *upon the same facts that were in issue in the former proceeding.*" (Italics are ours.)

Of the cases just mentioned the *Chung Shee* case bears the closest analogy to the present case. *Ex parte Gagliardi, supra,* is to the same effect.

It is submitted that Commissioner Glass's finding that there was no probable cause in the present case was a judicial determination "of the issues of law and fact necessarily involved in that result" (*Collins* v. *Loisel, supra*), and that Judge Cliffe had no jurisdiction to rehear and redetermine those issues.

That where the effect of a prior adjudication of an issue of fact arises, it is a question which is presented at the outset, and before a new hearing is had, is shown by the cases in which equity grants an injunction against a subsequent hearing by an administrative officer exercising judicial power to redetermine an issue or fact which has previously been determined by another officer having jurisdiction to decide such issue or fact, or where the parties themselves are enjoined from proceeding again in another court.

> *Lane* v. *Watts,* 234 U. S. 525.
>
> *Noble* v. *Union River Logging R. R.* 147 U. S. 165.
>
> *Toledo Scale Co.* v. *Computing Scale Co.* 281 Fed. 488.

An exhaustive examination of the authorities has failed to disclose any decided case, or any judicial utterance, in conflict with the view stated in the cases above

cited, and it is difficult to conceive that a different rule could be laid down by an American court of justice. Obviously, the bringing of successive indictments does not present an analogous situation. The finding by a grand jury is not in any sense a judicial act. It is an *ex parte* proceeding. The defendant is not present before the grand jury and has no right to present testimony. There is no issue of fact or law to be heard and determined between parties properly before a judicial tribunal. The indictment is a mere charge and does not determine any substantive right of the defendant.

It is clear also that preliminary hearings conducted by a magistrate under state statutes for the purpose of committing the accused are not similar in character to a removal hearing under Section 1014. Under the state practice the entire preliminary hearing may be dispensed with without violating any constitutional right of the accused. Furthermore, the removal of the defendant to another jurisdiction is not involved.

There are particular reasons why the general rule as to the effect of a former adjudication should be held to apply to removal cases under Section 1014 where the defendant has been discharged after a full hearing. As we have already pointed out, the right to a hearing is firmly based upon the Constitution itself and any infringement of that right is not mere error but a violation of the constitutional rights of the accused. In *Harlan* v. *McGourin*, 218 U. S. 442, this Court, referring to *Tinsley* v. *Treat*, said:

> "It was held that while an indictment constitutes *prima facie* evidence of the offense, when the defendant offered to show that no offense had been committed triable in the district to which removal was sought, the exclusion of such evidence was not mere error, but a denial of a right secured under the Federal Constitution to be tried in the State and

district where the alleged offense was committed, and therefore reviewable under *habeas corpus* proceedings."

To hold that one examining magistrate has jurisdiction to inquire into or to correct error committed by another examining magistrate is to fly in the face of one of the most elementary of the principles upon which the orderly administration of justice is founded.

The correction of error in a judicial decision is a function of tribunals having appellate jurisdiction. Any departure from this rule would plunge our judicial system into chaos. Indeed, the disorder and confusion which would result if judicial officers having concurrent jurisdiction were to be permitted to review each other's decisions are so obvious that courts are rarely asked to exercise any such jurisdiction. The authorities already cited, however, are clearly based upon this fundamental consideration, and in one of them—*United States* v. *Yeung Chu Keng, supra*,—the court pointed out that the application for a rehearing was in effect an attempt to get a district judge to exercise an appellate jurisdiction which he did not possess. The court said (p. 751):

> "If, when a Chinese person is discharged by a United States commissioner after hearing, another complaint may be laid before a United States District Court or judge, based upon the same facts, it is in effect a re-examination into the facts. If one re-examination may be had, why not several before different commissioners? * * * Certainly there is no express power given by statute to this court to revise a decision by a commissioner in a Chinese case, where the defendant has been discharged (no appeal even is given to the government), *and in the absence of such express power of revision this court does not possess authority to do that which in practical effect is revision.*" (Italics are ours.)

The application of this reasoning to the present case is obvious. Under Section 1014, as under the statute providing for deportation, an order of discharge is not

appealable, and the institution by the Government of the second proceeding for the removal of the appellant in the instant case must therefore be regarded as an attempt to obtain by indirection a right which Congress has not seen fit to grant.

If this method,—unsanctioned by statute, unwarranted by judicial precedent—of obtaining a review of an order of discharge is to be allowed, the right to resist removal, hitherto so sedulously protected by this court, becomes of little value. Counsel will still be bound to advise their clients that they have a constitutional right to a hearing on removal, but it is obvious that they will also be bound to advise them that it rests entirely with the counsel prosecuting the case to make the exercise of that right so burdensome, and render the chance of ultimate success so remote, as to make it practically valueless. That any Government official in a country claiming to be free should have such power would be intolerable.

CONCLUSION.

In this state of the authorities, it is submitted that the Government's motion to dismiss or affirm this appeal is out of place. The only authority cited in favor of its contention is in fact opposed to it. It is not claimed, and as we believe cannot be maintained, that it is in accordance with any practice established or ever followed by any lower court in any removal proceeding. If a new and unheard of rule is to be applied in removal proceedings, a rule which will in effect destroy the rights of the accused as defined in *Tinsley* v. *Treat*, it should not be established *sub silentio* by the granting of a motion to dismiss or affirm.

HERBERT POPE,
FRANK E. HARKNESS,
BENJAMIN M. PRICE,
Attorneys for Appellants.

In the Supreme Court of the United States

OCTOBER TERM, 1924

UNITED STATES EX REL. F. C. RUTZ, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 935
UNITED STATES EX REL. R. R. FAUNTLEroy, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 936
UNITED STATES EX REL. J. R. STENECK, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 937
UNITED STATES EX REL. HARRY C. WANner, appellant *v.* ROBERT R. LEVY, UNITED STATES MARshal, in and for the Northern District of Illinois	No. 938

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF OHIO

MOTION BY THE UNITED STATES TO DISMISS OR AFFIRM AND BRIEF IN SUPPORT

The Solicitor General, on behalf of the appellee in the above-entitled causes, moves the Court to dismiss or affirm the appeals therein on the ground

that the single question of law involved is elemental and that the appeals were not taken in good faith but solely for the purpose of delay.

This motion is submitted to the Court on the record in No. 935, counsel having entered into the following stipulation:

> The records in the above entitled causes being substantially similar, it is hereby stipulated between counsel for the respective parties that the record in the *Rutz case* only be printed; that the *Fauntleroy, Steneck, and Wanner cases* shall be submitted to the Supreme Court on motions to dismiss or affirm on the printed record in said *Rutz case*; and that the same judgments shall be entered in the *Fauntleroy, Steneck, and Wanner cases* as shall be entered by the Supreme Court in the *Rutz case*.

STATEMENT

The appellants, Rutz, Fauntleroy, Steneck, and Wanner reside in the Northern District of Illinois, and the Government is seeking to remove them to the Northern District of Ohio to stand trial on an indictment returned in that district on March 27, 1924, charging them, together with 43 other persons and 47 corporations, with having engaged in a combination in restraint of interstate trade and commerce in malleable iron castings, in violation of Section 1 of the Act of July 2, 1890 (26 Stat. 209), known as the Sherman Antitrust Act.

The institution of removal proceedings against these appellants was deferred until after the valid-

ity of the indictment had been passed upon by the trial court in the Northern District of Ohio. On July 15, 1924, the trial court overruled the demurrers and motions to quash filed by certain defendants, saying, among other things:

> * * * the indictment is unexceptionable, both as to form and substance. * * * If the allegations of the indictment are proved, each and all of the defendants are guilty of a violation of sec. 1 of the Sherman Act.

The procedure to remove offenders against the laws of the United States from districts in which they reside, or may be apprehended, to districts where indictments may be pending against them, is laid down in Section 1014, Rev. Stat., which reads as follows:

> For any crime or offense against the United States, the offender may, by any justice or judge of the United States, or by any commissioner of a circuit court to take bail, or by any chancellor, judge of a supreme or superior court, chief or first judge of common pleas, mayor of a city, justice of the peace, or other magistrate, of any State where he may be found, and agreeably to the usual mode of process against offenders in such State, and at the expense of the United States, be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offense. Copies of the process shall be returned as speedily as may

> be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case. And where any offender or witness is committed in any district other than that where the offense is to be tried, it shall be the duty of the judge of the district where such offender or witness is imprisoned, seasonably to issue, and of the marshal to execute, a warrant for his removal to the district where the trial is to be had.

In conformity with the provisions of this statute, removal proceedings against the appellants were instituted before a United States Commissioner for the Northern District of Illinois on December 2, 1924. Each of the appellants, *with the exception of Fauntleroy, who was said to be in California,* duly appeared and accepted service of the warrants issued for their arrest, and gave bond for their appearance at the time and place set for the hearing.

The hearing before the Commissioner lasted a full week. Nothing which transpired before the Commissioner is of interest here except the result. The Commissioner said, in delivering his opinion, that " it would appear that there was active competition in the malleable-iron industry, not only among members of the American Malleable Castings Association, but among those that were not members of the Association," and ordered that Rutz, Steneck, and Wanner be discharged.

The complaint pending before the Commissioner against Fauntleroy was subsequently dismissed (over the objection of his counsel) on motion of the Government because a new complaint had been filed against him before a United States District Judge.

The Commissioner discharged Rutz, Steneck, and Wanner on December 20, 1924. On December 24, 1924, a new complaint was filed before the Honorable Adam C. Cliffe, one of the Judges of the United States District Court for the Northern District of Illinois, against Rutz, Steneck, and Wanner—and also Fauntleroy, as to whom a complaint filed before the Commissioner was dismissed. Counsel for the defendants challenged the right of the Government to institute removal proceedings de novo before the court, on the ground that the action of the Commissioner in discharging the defendants was res judicata. Judge Cliffe set the matter for argument on January 12, 1925, and, instead of requiring the defendants to give bonds for their appearance, placed them in the custody of Allan J. Carter, Esq., one of their attorneys.

On January 12, 1925, after hearing oral arguments on the question whether the action of the Commissioner in discharging the defendants was res judicata, Judge Cliffe said, among other things:

> It seems to me, the thing that you are losing sight of here is that these defendants are entitled to a day in court. They are entitled to a trial according to a regular form. Now, where is that trial? That trial is where the

indictment is made, in the district of Ohio; no question about that. And any defenses are properly there.

Now, so far as the Commissioner is concerned, this is the fact, the Commissioner—I do not think that anybody will gainsay the proposition—the Commissioner is entitled to receive any evidence in his mind that might go to the question of probable cause. No question about that. It is also fundamental, this indictment, properly certified, I think there is no question, is prima facie evidence. There is no question about that. Now, it seems to me the big thing that is misconceived in this whole hearing is that the Commissioner arrogated or took upon himself the right to hear the case in its original inception. Now, he has got certain rights, but there is no question about this, the Government has got the same right to have this case heard just the same as the defendants have, and they have got a forum in which that must be determined, and all reasonable intendments, matters of common sense must be indulged in. It seems to me that this is purely technical, and *the motion is overruled,* and exception. Now, when do you want to proceed on the merits? [Italics ours.]

The court set the matter for hearing at 2 p. m. January 14, 1925. About 12 o'clock noon on January 14th, Allan J. Carter, Esq., the attorney in whose custody the defendants had been released, notified counsel for the Government that the defendants were present in court; that he proposed

to surrender them immediately; and that if they were taken into custody writs of habeas corpus would be procured, with a view to having another judge review the decision of Judge Cliffe that the discharge of the defendants by a Commissioner was not res judicata. Upon the surrender of the defendants they were promptly arrested and taken into custody, and in due course writs of habeas corpus were issued by Honorable Evan A. Evans, one of the Judges of the United States Circuit Court of Appeals, duly designated and appointed to hold a term of the United States District Court. The prisoners were released under bonds of $5,000 each for their appearance at the proper time and place.

On January 22, 1925, counsel for the Government filed a motion (1) to dismiss the petitions for writs of habeas corpus, (2) to vacate the writs of habeas corpus granted upon said petitions, and (3) to remand the petitioners to the custody of the United States Marshal for detention under warrants issued on January 14, 1925, by order of Judge Cliffe. Judge Evans heard oral arguments on this motion, accepted briefs, and took the question under advisement.

Judge Evans filed an opinion on February 2, 1925, granting the motion to quash the writs of habeas corpus. Among other things, the court stated:

> The foregoing statement serves merely as a background to assist in determining whether the Commissioner's action in find-

ing a want of probable cause is conclusive or a bar to a similar proceeding before the judge. That the court commissioner's action is not res adjudicata must be conceded. * * * If the determination by Court Commissioner Glass is not res adjudicata, then what authority is there for the writ of habeas corpus to prevent Judge Cliffe from hearing the matter? There is not the slightest suggestion that the Judge before whom the present application is pending will not give to the decision of the Court Commissioner such weight as it deserves. Yet, by this writ of habeas corpus it is sought to deny to Judge Cliffe the right to hear the removal proceedings, and such position can not be sustained by questioning whether he will give to the Court Commissioner's finding such weight as petitioners believe it is entitled to receive. Conceding the right to a hearing under any circumstance, the foundation upon which the habeas corpus proceedings were instituted crumbles. * * * It is not necessary to stress other objections to this procedure by a writ of habeas corpus. The petition before Judge Cliffe did not even disclose the prior proceedings before Commissioner Glass. The Judge therefore was clearly authorized to proceed with the hearing. He was not permitted to do so because this writ of habeas corpus was secured. *It is difficult to escape the conclusion that this proceeding was for the purpose of delay, and such practices should be condemned.* [Italics ours.]

Immediately upon the filing of the opinion by Judge Evans, counsel for the prisoners applied for and were granted an appeal to this Court. Subsequently, on February 25, 1925, Judge Evans, of his own volition, called counsel for the appellants before him to show cause why the court should not set aside the order previously entered allowing a supersedeas. In the course of a discussion of the subject Judge Evans remarked:

> * * * I, in my own mind, am convinced that that is not a real legitimate question, this question of hearing on habeas corpus. If you should argue before Judge Cliffe, the force and effect of Judge Cliffe's (*sic*) [the Commissioner's] decision, that is one thing; but on that question of habeas corpus, the more I thought about it, the less I have had the belief there is good faith back of it. Now, the writ of habeas corpus is the right way to get the case to the Supreme Court, and that is the right way to secure a delay.

ASSIGNMENTS OF ERROR

Briefly stated, the errors assigned are that the court (Judge Evans) erred:

> A. In refusing to hold that the detention of the defendants by the Marshal, under the warrants of arrest issued by Judge Cliffe, was in violation (1) of Section 2, Article III of the Constitution, (2) of the Sixth Amendment to the Constitution, (3) of the Fifth Amendment to the Constitution, and (4) of

parent and conceded," said (*Todd* v. *United States*, 158 U. S. 278, 282–283):

> He is simply an officer of the Circuit Court, appointed and removable by that court. *Rev. Stat. Sec. 627, Ex parte Hennen,* 13 Pet. 230; *United States* v. *Allred,* 155 U. S. 591. A preliminary examination before him is not a proceeding in the court which appointed him, or in any court of the United States. Such an examination may be had not merely before a commissioner, but also before any justice or judge of the United States, or before any chancellor, judge of a state court, mayor of a city, justice of the peace, or other state magistrate. *Rev. Stat. sec. 1014.* And it can not be pretended that one of those state officers while conducting a preliminary investigation is holding a court of the United States.

In considering the function exercised by a commissioner in committing a prisoner to await the action of a grand jury, the court *In re Martin,* Fed. Case No. 9151, said:

> If he finds probable cause to hold the party for trial, he commits him; if not, he discharges him. In neither case is his action final, or a bar to further proceedings. If the prisoner is discharged, he may be again arrested, and, on sufficient evidence, may be committed. If he is committed, he may apply to the court to reduce his bail, or the prosecuting officer may apply to have it increased, or to discharge him altogether.

> In none of these proceedings of the commissioner are his orders in the nature of a final judgment of a court of record. * * *

The principle of res judicata was very comprehensively stated by this Court in *Oklahoma City* v. *McMaster,* 196 U. S. 529, 533, as follows:

> Without a judgment the plea of *res judicata* has no foundation; and neither the verdict of a jury nor the findings of a court, even though in a prior action, upon the precise point involved in a subsequent action and between the same parties, constitute a bar. In other words, the thing adjudged must be by a judgment. A verdict, or finding of the court alone, is not sufficient. The reason stated is, that the judgment is the bar and not the preliminary determination of the court or jury. It may be that the verdict was set aside, or the finding of facts amended, reconsidered, or themselves set aside or a new trial granted. The judgment alone is the foundation for the bar.

A United States Commissioner cannot enter a final judgment in a removal proceeding under Section 1014, Rev. Stat. The most he can do is to order a defendant committed pending application for and issuance of a warrant of removal by a judge.

The specific question is whether the action of a commissioner in discharging a defendant sought to be removed under Section 1014, Rev. Stat., is res judicata. At the time this question was submitted to Judge Evans, it had been specifically and author-

itatively determined in but one reported case—*United States* v. *Haas,* 167 Fed. 211, decided by District Judge Holt on May 9, 1906. In that case the court said:

> The defendant's counsel claims that the decision of Commissioner Ridgway should be held to be conclusive. He admits that such a decision is not technically res adjudicata, and the authorities so hold. The decision of a committing magistrate *refusing to hold a prisoner for trial or removal, like the grand jury's decision in refusing to find an indictment,* is not res adjudicata, *and another application can be made upon the same facts. In re Martin,* 5 Blatch. 307, Fed. Cas. No. 9,151; Cooley's Const. Lim. 404; 1 Bish. New Cr. Law, sec. 1014, par. 2; *Com.* v. *Hamilton,* 129 Mass. 479.

On the very same day Judge Evans filed his opinion holding that the action of the commissioner in discharging the appellants herein was not res judicata, and in the course of which he stated that the case of *United States* v. *Haas,* 167 Fed. 211, justified special reference, this Court handed down its opinion in the case of *Morse* v. *The United States* (No. 597, Oct. Term, 1924), in which it held:

> The judgment rendered therein, whatever may be its effect in subsequent proceedings of the same character involving the same question—*Salinger* v. *Loisel,* 265 U. S. 224, 230–232; *Collins* v. *Loisel,* 262 U. S. 426, 430; *United States* v. *Haas,* 167 Fed. Rep. 211, 212—does not abridge the power of the trial

court to deal independently with the main cause if the accused be subsequently arrested and brought before that court to answer to the indictment.

CONCLUSION

It is respectfully submitted that the appeals should be dismissed or the orders of the court below affirmed, and the mandate of the court sent down forthwith.

JAMES M. BECK,
Solicitor General.

MARCH, 1925.

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